86-250

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

STATE OF ALABAMA,

Petitioner

vs.

HARRY PEOPLES,

Respondent

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES ELEVENTH CIRCUIT COURT OF APPEALS

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ATTORNEY GENERAL OF ALABAMA

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APPENDIX A

Harry Peoples

v.

State.

415 So. 2d 1230

3 Div. 420

Court of Criminal Appeals of Alabama.

June 8, 1982.

TYSON, Judge.

The appellant was indicted and convicted for the murder of Plemmie Mae Mangum by shooting her with a pistol in violation of Ala.Code §13A-6-2 (Supp. 1977). The trial court fixed his punishment at twenty years in the State penitentiary.

I.

[1] Appellant contends for the first time on this appeal that the evidence was insufficient to support a

conviction. There was no motion to exclude the evidence, no request for the affirmative charge, and no motion for a new trial. Under a long line of cases, the sufficiency of the evidence is not subject to review unless challenged by one of those procedures in the trial court. Lewis v. State, 372 So. 2d 882, 884-885 (Ala. Cr. App.) cert. denied, 372 So. 2d 885 (Ala. 1979) and cases cited herein.

II

[2] Appellant also contends for the first time on appeal that the admission of the murder weapon was improper because the State did not prove chain of custody. Again, there is no merit to this contention. The pistol was admitted without objection. Thus nothing was preserved for review. Brown v. State,

392 So. 2d 1248, 1260 (Ala. Cr. App. 1980), cert. denied, 392 So. 2d 1266 (Ala. 1981).

III

[3] Appellant admitted when he took the witness stand in his own behalf that he had two prior felony convictions, one for grand larceny for which he received twenty months' imprisonment and another for a drug charge involving heroin for which he received seven years' imprisonment. Ala. Code §13A-5-9(b)(3) (Supp. 1981) mandates that in all cases when it is shown that a criminal defendant has been previously convicted of any two felonies and then is convicted of a Class "A" felony, "he must be punished by imprisonment for life or for any term of not less than 99 years." Once a defendant admits prior felony

convictions they are proved for purposes of the Habitual Offender Act. See, Smith v. State, 409 So. 2d 455 (Ala. Cr. App. 1981); Douglas v. State, 406 So. 2d 1051 (Ala. Cr. App.) cert. denied, 406 So. 2d 1053 (Ala. 1981).

In Motley v. State, 409 So. 2d 945 (Ala. Cr. App. 1981) this Court held that narcotics convictions under §20-2-70, Code of Alabama, shall be considered as class "C" felonies for the purposes of applying the Alabama Habitual Felony Offender Act. Section 13A-5-4, Code of Alabama (amended 1977).

[4] We affirm the guilt phase of the trial. However, because of the failure to apply the Habitual Felony Offender Act, we remand this cause with directions to the trial court to conduct another sentencing hearing applying said act. The State of Alabama should, a

reasonable time prior to the sentencing hearing, notify the appellant of the prior convictions under which the State plans to proceed, although for all practical purposes the appellant is aware of such prior convictions.

All parties should be present, with counsel, and any evidence offered shall be recorded for this court's review. A complete transcript of these proceedings shall be transmitted to this court under Motley, supra and Aplin v. State, (Ms. December 29, 1981) (Ala. Cr. App. 1981).

AFFIRMED, BUT REMANDED WITH DIRECTIONS FOR ANOTHER SENTENCING HEARING.

All the Judges concur.

APPENDIX B

Harry Peoples

v.

STATE.

3 Div. 420.

Court of Criminal Appeals of Alabama.

Nov. 2, 1982.

AFTER REMANDMENT

TYSON, Judge.

This case was remanded to the Circuit Court of Montgomery County, Alabama for a new sentencing hearing. Peoples v. State, 415 So. 2d 1230 (Ala. Cr. App. 1982). In strict compliance with the order of this court that a new sentencing be held, such was set at which appellant and his counsel were present.

The state introduced into evidence two certified copies of judgments of

conviction showing that Peoples, the appellant, had been previously convicted of grand larceny for which he had received a twenty-month sentence and for a drug conviction involving heroin in federal district court, for which he received seven years' imprisonment.

After these two convictions were placed in evidence before the circuit court, the appellant was sentenced to life imprisonment pursuant to the provisions of §13A-5-9(b)(3), which requires that the appellate be imprisoned "for life or for any term of not less than 99 years."

A supplemental transcript showing this resentencing, including the certified copies of the two previous convictions, was filed in this court.

Upon consideration of the supplemental transcript which includes

the two certified copies of the two previous felony convictions, this case is affirmed.

AFFIRMED.

all the Judges concur.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

HARRY PEOPLES,	)	
	)	
Petitioner	)	
	)	
v.	)	CIVIL ACTION NO.
	)	84-V-163-N
GEORGE BOWEN, et al.,	)	
	)	
Respondents.	)	

REPORT AND RECOMMENDATION
OF THE MAGISTRATE

Petitioner, a state prison inmate, brought an action in this court under 28 U.S.C. §2254. In his petition, the petitioner raises five issues as grounds for relief. They are as follows:

1. That the trial court incited the jury to reach a hasty verdict;

2. That trial counsel was ineffective because he did not object to the trial court ordering the jury to

resume deliberations while waiting for family members to bring necessities for overnight sequestration;

3. That trial counsel was ineffective by failing to move for a new trial on the grounds that the trial court asked defense counsel in the jury's presence if the jury could separate for the night;

4. That trial counsel was ineffective by failing to request a jury charge concerning actions of the deceased victim as being a justification for the homicide; and

5. That appeal counsel was ineffective by taking an appeal when he knew of the possible implications of the Alabama Habitual Offender statute.

On November 6, 1984, the Magistrate conducted an evidentiary hearing in this cause. Petitioner appeared with able,

court-appointed counsel and the respondent was represented by counsel. Based upon the testimony and other evidence presented at the evidentiary hearing, the Magistrate makes the following findings:

On May 21, 1981, petitioner was convicted of murder in the Circuit Court of Montgomery County, Alabama. He was represented at trial by the Honorable Harry Perdue, a local Montgomery attorney with thirty (30) years experience in defending criminal cases. Petitioner had retained Mr. Perdue to represent him at his trial. Subsequent to his conviction, petitioner was sentenced by the trial court to serve a term of twenty (20) years imprisonment. Mr. Perdue gave oral notice of appeal in open court but later he withdrew as petitioner's counsel. The trial court subsequently appointed

Honorable Donald R. Harrison to represent petitioner on his appeal. The Alabama Court of Criminal Appeals affirmed the conviction of petitioner but remanded the case for a new sentencing hearing mandating the trial court to sentence petitioner pursuant to the provisions of the Alabama Habitual Offender statute. The trial court conducted a resentencing hearing and sentenced petitioner as a Habitual Offender to life without parole.

After the Alabama appellate court process was completed by way of direct appeal, petitioner filed, on July 28, 1983, a petition for writ of error coram in the Circuit Court of Montgomery County. In that petition, petitioner raised the identical claims that he now raises in the instant petition for writ of habeas corpus. On August 17, 1983,

the petition for writ of error coram nobis was denied without a hearing. On November 1, 1983, the Court of Criminal Appeals of Alabama affirmed without opinion the denial of the petition for writ of error coram nobis. Rehearing was overruled on November 29, 1983, and certiorari was denied by the Supreme Court of Alabama on January 13, 1984.

Petitioner's first issue as grounds for relief in his habeas corpus petition is absolutely without merit. Petitioner claims that his due process and equal protection rights were violated because the trial court "incited" the jury to reach a "hasty" decision. Petitioner claims that this "incitement," resulted from the trial court allowing the jury to deliberate while waiting for jurors' families to bring their personal items needed for overnight sequestration.

In addition to conducting an evidentiary hearing in this cause, the Magistrate has reviewed the complete state trial transcript of petitioner's trial. The transcript reflects that the jury retired to begin deliberations at 5:00 p.m. and that at 5:30 p.m., the jury returned to the courtroom for the purpose of posing a question to the court. The court told the jury that he could not answer their question and then he made the following statements:

> THE COURT: Ladies and Gents, it appears that you may not have enough time today to arrive at a verdict in this case, so the case will have to go over into tomorrow. As I told you, you wouldn't be sequestered until you begin your deliberations, but now that you have begun those deliberations you will be sequestered, which means that you'll be our guests and be put up at a local motel. A deputy sheriff will accompany you to dinner and breakfast. We

wanted to give you an opportunity to make a call home, if you've got somebody at home and ask them to put whatever your overnight needs are in some kind of container for you, overnight bag or whatever, so that you can arrange to have them brought to you. And you'd be able to spend the night without making any undue sacrifices. What we're going to do is take a recess at this time. We'll have all of you on this same area, but you can use our phones here in our area of the courthouse and call home and explain the situation. If you've got somebody there that can pick up a bag for you, ask them to bring it down. If you don't have anybody at home, if nobody is there at the time, or if you think you'll have to go get something yourself, well we'll arrange to accommodate you there too. Why don't we take about a ten-minute recess for you all to make your phone calls, and then we'll resume deliberations.

(Whereupon, after a ten-minute recess, all parties being present, the trial proceeds as follows, to-wit:)

THE COURT: Ladies and Gentlemen, we figured we have a little time before going to

eat, and that we might as well not waste that time. You may resume your deliberations. We won't be going to eat before six-fifteen or something like that anyway and maybe not then. We're trying to make arrangements, but if you'll retire and resume your deliberations as there's always a possibility you might arrive at a verdict before then.

(Whereupon, the time being 5:53 p.m., the jury retired to the Jury Room, and the trial proceeds as follows, to-wit:)

THE COURT: Okay, bring them out and let them line across the front there, please sir.

(Whereupon, the Jury returned to the courtroom at 6:30 p.m., and all parties being present, the trial proceeds as follows, to-wit:)

THE COURT: All right, Ladies and Gentlemen, you have prepared a verdict form, filled in the verdict form, and handed it to the Bailiff, and he now hands it to me. And I read it.

State of Alabama versus Harry Peoples, Jury verdict: "We, the Jury, find the Defendant Harry Peoples guilty of the

> offense of murder as charged in the indictment." This finding is signed by the foreman of the Jury that conducted the trial...

It becomes quite evident from a review of the trial transcript that the trial court simply exercised his discretion by allowing the jury to continue their deliberations while arrangements were being made to take them to supper. This action of the trial court did not deprive the petitioner of any constitutional right nor did it prejudice him in any way.

Petitioner's remaining issues as grounds for relief in this cause involve claims of ineffective assistance of counsel, both by retained trial counsel and by appointed counsel on appeal. In Strickland v. Washington, ____ U.S. ____, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Supreme Court of the United States

for the first time formulated a standard for determining whether a defense lawyer's performance was so ineffective as to require setting aside the conviction. Justice O'Connor, speaking for the Court, said that in any case presenting an ineffectiveness claim the inquiry into the attorney's performance must be "whether counsel's assistance was reasonable considering all the circumstances. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." The Court declared that even a professionally unreasonable error by counsel does not warrant setting aside the judgment if the error had no effect on the judgment. "The defendant must show that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

The testimony presented at the evidentiary hearing, and petitioner's state court trial transcript, demonstrates that trial counsel competently and effectively represented petitioner at all stages of the criminal proceedings. The Magistrate finds that under the Strickland standard, petitioner clearly fails to meet his burden of proof for establishing an ineffective assistance of trial counsel claim.

Petitioner's claim that his trial counsel was ineffective by not objecting to the trial court ordering the jury to resume deliberations while waiting for

family members to bring necessities for overnight sequestration is without merit. The Magistrate has already made a finding that the trial court simply exercised his discretion when he required the jury to resume deliberations while waiting for family members to bring necessities for overnight sequestration and until arrangements could be made to take the jurors to supper.

Petitioner claims that his trial counsel was ineffective in failing to move for a new trial on the grounds that the trial court asked defense counsel, in the jury's presence, if the jury could separate for the night. The Magistrate finds that the trial court never asked defense counsel in the jury's presence if the jury could separate for the night. Consequently, there would have been no

need for trial counsel to move for a new trial.

Petitioner claims his trial counsel was ineffective in failing to request a jury charge concerning actions of the deceased victim as being a justification for the homicide. The Magistrate has reviewed in detail the court's charge to the jury as reflected in the state court transcript. The court charged the jury in detail relative to the lesser included offenses petitioner could be convicted of, in the event the jury found him guilty of shooting the deceased. The court's charge in the instant case was more than fair to ensure that petitioner received a fundamentally fair trial. The trial court's failure to give an instruction or to give an erroneous instruction is not a subject for federal

habeas corpus relief absent an affirmative showing by the petitioner that the action of the trial court denied him a fundamentally fair trial. Bonner v. Henderson, 517 F. 2d 135 (5th Cir. 1975); Smith v. Smith, 454 F. 2d 572, 579 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972); Grech v. Wainwright, 492 F. 2d 747 (5th Cir. 1974); Carrizales v. Wainwright, 699 F. 2d 1053 (11th Cir. 1983). Assuming that the trial court made an error by failing to give a written requested jury charge to a specific issue, it does not justify habeas corpus relief unless it is of such a magnitude as to render the trial fundamentally unfair and violative of due process. Panzavecchia v. Wainwright, 658 F. 2d 337 (5th Cir. 1981).

The burden is on the petitioner in a habeas corpus case to clearly establish that his constitutional rights have been violated. The petitioner fails to show that the court's charge in the instant case deprived him of a fundamentally fair trial. The Magistrate finds nothing in the record or, presented by way of testimony at the evidentiary hearing, that would support a contention that petitioner did not receive a fair trial. Petitioner fails in all respects to establish that his trial counsel was ineffective at any state of petitioner's trial.

Petitioner's final claim in this case is that his appellate court-appointed counsel was ineffective because he pursued an appeal of petitioner's case. Mr. Harrison was appointed by the trial court to represent petitioner on

his appeal to the Alabama Court of Criminal Appeals. The evidence demonstrated that Mr. Harrison was aware of the Alabama Habitual Offender law and that it was in existence at the time of the appeal of petitioner's case. The evidence demonstrated that at the time Mr. Harrison was representing petitioner on his appeal no one was really sure how the Habitual Offender law was to be applied. This included trial judges and district attorneys. The evidence demonstrated that Mr. Harrison never imagined that there would be a risk of petitioner receiving a greater sentence simply because the conviction was appealed. The evidence demonstrated that Mr. Harrison believed that the trial court had discretion on whether or not to apply the Habitual Offender statute. Since the trial court mistakenly did not

apply the new law at petitioner's original sentencing hearing, and since the district attorney did not ask for it, Mr. Harrison believed in good faith that there was absolutely no risk of petitioner receiving a greater sentence than the one imposed by the trial court at the first sentencing hearing. Subsequently, in its appellate opinion, the Alabama Court of Criminal Appeals, in a case of first impression, affirmed the conviction but remanded petitioner's case for a second sentencing hearing and required the trial court to mandatorily apply the Habitual Offender statute. Since petitioner had taken the stand in his lower court trial testifying that he had two prior felony convictions, the trial court had no choice but to sentence petitioner to a life sentence without parole.

In an earlier habeas corpus action in this court, Harry Peoples v. Larry Spears, et al., Civil Action No. 83-V-116-N, petitioner argued that his resentencing was violative of the Constitution. In disagreeing with petitioner's contention the court held as follows:

> It is well established that a sentence, which fails to comply with the criminal statute by which it is authorized, is erroneous and may be set aside on appeal or in habeas corpus proceedings. See, Bozza v. United States, 330 U.S. 160 (1947); In re Bonner, 151 U.S. 242 (1893). In Bonner, the Court rejected the idea that a prisoner, whose guilt is established by verdict, may escape punishment because the Court committed an error in passing the sentence. In this case, the trial court set aside the sentence which it had no authority to impose and did what the law required it to do. See, In re Bonner, supra; see, also, United States v. DiFrancesco, 449 U.S. 117 (1980).

The Magistrate finds that Mr. Harrison's assistance was reasonable considering all of the circumstances of this case. Mr. Harrison exercised reasonable professional judgment in pursuing an appeal of petitioner's case. Mr. Harrison should not be adjudged ineffective simply because the trial court failed to mandatorily apply what, at the time, was a confusing law. The Magistrate finds that under the Strickland standard petitioner fails in all respects to meet his burden of establishing that his appellate counsel was ineffective.

Accordingly, it is the RECOMMENDATION of the Magistrate that the petition for writ of habeas corpus be DENIED and that this cause be DISMISSED.

DONE this 15th day of November, 1984.

/S/ JOEL F. DUBINA
UNITED STATES MAGISTRATE

APPENDIX D

Harry PEOPLES, Petitioner, Appellant,

v.

George BOWEN, et al.,
Respondents-Appellees.

No. 85-7047.

United States Court of Appeals,
Eleventh Circuit.

June 17, 1986.

Appeal from the United States District Court for the Middle District of Alabama.

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

GODBOLD, Chief Judge:

This habeas case presents an unusual situation. A prisoner is erroneously given a 20-year sentence when he should have been given a mandatory sentence of life or 99 years. His counsel, who is unaware that life or 99 years is

mandatory, takes a "no merit" appeal, and the appellate court, on its own motion, vacates the 20-year sentence and orders that the prisoner be resentenced. The trial court then sentences him to life. We hold that the federal district court erred in denying the writ.

I. TRIAL, APPEAL AND RESENTENCE

Peoples, an Alabama state prisoner, was convicted May 21, 1981 of murder, pursuant to Alabama Code §13A-6-2 (Suppl. 1977). The court continued the case for sentencing to June 12, 1981, noting that the probation staff was not available. On June 12 Peoples was sentenced to 20 years. Immediately upon imposition of sentence trial counsel withdrew and, on July 31, 1981, Donald Harrison was appointed for appeal. The trial transcript was not completed until March

5, 1982, and petitioner's brief to the Alabama Court of Criminal Appeals was filed April 9, 1982. The only issues raised were sufficiency of the evidence and admissibility of a single piece of evidence, neither of which had been properly preserved at trial. The court, Peoples v. State, 415 So. 2d 1230 (Ala. Crim. App. 1982), summarily rejected both arguments on the ground nothing was presented to it for review and affirmed the guilt phase of the trial. Then, on its own motion, the court took up the matter of the sentence, an issue not raised by either party. It noted the requirements of the Alabama Habitual Felony Offender Act, Alabama Code §13A-5-9(b)(3) (Supp. 1981), which provides:

> (b) In all cases when it is shown that a criminal defendant has been previously convicted

> of any two felonies and after such convictions has committed another felony, he must be punished as follows:
>
> * * * * * *
>
> (3) On conviction of a Class A felony, he must be punished by imprisonment for life or for any term of not less than 99 years.

Murder is a class A felony.

The court referred to prior case law holding that once a defendant admits prior felony convictions they are proved for purposes of the HFOA, and it noted that in his trial testimony Peoples had admitted to two prior felonies, grand larceny and a heroin drug charge. Having laid this predicate, the court remanded the case to the trial court with instructions to conduct a sentencing hearing and apply HFOA.[1]

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[1]The court of criminal appeals followed the same approach in later cases, e.g., Chambers v. State, 418 So.2d 948 (Ala. Crim.App. 1982); Coleman v. State, 424 So.2d 685 (Ala. Crim. App. 1982).

On remand the trial judge resentenced Peoples to life. A transcript of the resentencing proceeding reveals that the following occurred. The state filed a motion with the trial court to invoke the HFOA and filed certified copies of two prior convictions. Peoples' counsel argued strenuously against resentencing. He noted that Peoples had testified at his trial and that the state had an opportunity to present evidence concerning his prior convictions but did not. Counsel argued that the trial court was in a better position to establish a sentence than an appellate court, and that the court of criminal appeals erred in reaching an issue not presented by either side. The trial judge responded that he was under "direct orders" of the court of criminal appeals to impose a sentence as directed

by that court and, therefore, he imposed life imprisonment.

Pursuant to the mandate of the court of criminal appeals, a transcript of the resentencing proceedings was forwarded to it and the court affirmed. 421 So. 2d 132 (Ala. Crim. App. 1982).

II. FIRST FEDERAL PETITION

In February 1983 Peoples filed a pro se habeas corpus petition in federal court. One of the grounds alleged was:

> Change allegedly adding to punishment for prior offense. Increase in length of sentence.

In the supporting facts for this allegation Peoples alleged that he had been found guilty of second degree murder and sentenced to 20 years. He described the appeal to the court of criminal appeals, the remand, and the resentencing. He stated that on remand the court "changed the charge from second

degree murder to first degree murder[2] and also changed the sentence from 20 years to life imprisonment." He alleged that because he testified at trial the trial court was fully aware of his prior record and at that time did not mention anything about the habitual offender law, and that he was not informed by the court or by his attorney prior to appealing the case that he could be resentenced under the habitual offender law. And he added, "If I had been inform of such ruling I probably wouldn't have appeal this case."

The state answered, admitting that the trial court was aware of the two priors when Peoples was originally sentenced, and that Peoples was not

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[2]This issue is out of the case. Degrees of murder had been abolished in Alabama when Peoples was tried. Hill v. State, 409 So. 2d 943 (Ala. Crim. App. 1981).

informed by the trial court or by his attorney when he gave notice of appeal that the case might or could be remanded for resentencing under HFOA. On the resentencing issue, the state responded that Peoples' being resentenced under the mandatory provision of the HFOA did not violate his constitutional protections.[3]

In a traverse to the state's answer Peoples set out that the possibility of facing greater sentence should a retrial be ordered operates as an improper and unconstitutional deterrent to assertion of a defendant's right to appeal.

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[3]The state did not raise failure to exhaust state remedies, therefore it was waived. Byrd v. Wainwright, 722 F. 2d 716, 718 n.3 (11th Cir. 1983), cert. denied, ____ U.S. ____, 105 S. Ct. 217, 83 L. Ed. 2d 147 (1984); Lamb v. Jernigan, 683 F. 2d 1332, 1335 n. 1 (11th Cir. 1982), cert. denied, 460 U.S. 1024, 103 S. Ct. 1276, 75 L. Ed. 2d 496 (1983).

The district court held

> Petitioner's resentencing was also not violative of the Constitution. It is well established that a sentence, which fails to comply with the criminal statute by which it is authorized, is erroneous and may be set aside on appeal or in habeas corpus proceedings. See, Bozza v. United States, 330 U.S. 160 [67 S. Ct. 645, 91 L. Ed. 818] (1947); In re Bonner, 151 U.S. 242 [14 S. Ct. 323, 38 L. Ed. 149] (1893). In Bonner, the Court rejected the idea that a prisoner, whose guilt is established by verdict, may escape punishment because the Court committed an error in passing the sentence. In this case, the trial court set aside the sentence which it had no authority to impose and did what the law required it to do. See, In re Bonner, supra; see, also, United States v. DiFrancesco, 449 U.S. 117 [101 S.Ct. 426, 66 L. Ed. 2d 328] (1980). Thus, Petitioner's contention that he has been subjected to multiple punishment is without merit because the guarantee against multiple punishment is not involved here.

The court dismissed the petition.

Peoples did not appeal.

III. FIRST STATE PETITION

Peoples repaired to the state court seeking collateral relief. In July 1983 he filed a coram nobis petition in the trial court. He alleged ineffectiveness of trial counsel, but none of the supporting allegations has any relation to the issue before us. Also he alleged ineffective assistance of counsel on appeal, with the following supporting allegation.

> Counsel's failure in his role as advocate was prejudicial to fundamental rights of petitioner.
>
> Where, Mr. Don Harrison, appeal counsel for petitioner failed to consult with petitioner before he filed his brief to the court of criminal appeals was prejudicial to fundamental rights of petitioner

The petition was denied without hearing in August 1983, and affirmed by the court of criminal appeals without opinion in November 1983, and certiorari was denied

by the Alabama Supreme Court in December 1983.

IV. SECOND FEDERAL PETITION

The second federal petition was filed pro se in February 1984. It alleged ineffective assistance of trial counsel but did not raise effectiveness of appellate counsel.[4] The state answered, referred to the prior federal petition, and alleged abuse of the writ.

The matter was assigned to a magistrate who issued an order to Peoples to show cause why the petition should not be dismissed pursuant to the state's claim of abuse of the writ. Petitioner

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[4]It did not allege that Peoples' resentencing violated the double jeopardy clause, but the magistrate raised this issue and decided that the procedures followed were constitutionally permissible. Peoples raises this issue on appeal, but because of our disposition on the ineffective assistance of appellate counsel claim, we need not address it.

responded, denying abuse of the writ, and contending that when he filed his first federal petition he alleged all the grounds that were available to him and that the grounds in the second petition came from evidence newly discovered after he received a transcript from his attorney on September 1, 1983.

Peoples moved for appointment of counsel, and the motion was granted.

The magistrate conducted a hearing on the abuse of the writ issue and, after taking testimony, recommended that the motion to dismiss for abuse of the writ be denied. He found that, under the evidence, when Peoples filed his first federal petition he was not aware of the issues that he ultimately raised, primarily because he did not have a copy of the state court transcript, and, being a layman and not having a working knowledge of the law, he was not aware

that he could raise an issue of ineffective assistance of counsel. Also the magistrate found that the state would not be prejudiced by allowing Peoples to proceed with his second petition. The state filed no objection to the recommendation of the magistrate that the motion to dismiss be denied, and the district court, noting the absence of objections, denied the motion.

With the abuse of the writ issue out of the way, the magistrate set the matter for evidentiary hearing on the merits. At the hearing, after dialogue with petitioner's counsel, the magistrate described the issues to be heard and included "that appeal counsel was ineffective by taking an appeal when he knew of the possible implications of the Alabama Habitual Offender statute." Thus the issue was before the district court.

Following the hearing the magistrate made these findings on this issue:

> The evidence demonstrated that Mr. Harrison never imagined that there would be a risk of petitioner receiving a greater sentence simply because the conviction was appealed. The evidence demonstrated that Mr. Harrison believed that the trial court had discretion on whether or not to apply the Habitual Offender statute. Since the trial court mistakenly did not apply the new law at petitioner's original sentencing hearing, and since the district attorney did not ask for it, Mr. Harrison believed in good faith that there was absolutely no risk of petitioner receiving a greater sentence than the one imposed by the trial court at the first sentencing hearing.

Also the magistrate quoted the order of the district court entered in the first federal proceeding, quoted above.

Finally, the magistrate found:

> Mr. Harrison's assistance was reasonable considering all the circumstances of this case. Mr. Harrison exercised reasonable professional judgment in pursuing an appeal

> of petitioner's case. Mr. Harrison should not be adjudged ineffective simply because the trial court failed to mandatorily apply what, at the time, was a confusing law. The Magistrate finds that under the Strickland standard petitioner fails in all respects to meet his burden of establishing that his appellate counsel was ineffective.

Counsel for Peoples objected to the magistrate's recommendations, asserting the following. The testimony of Harrison had brought out that the two issues he raised with the court of appeals were not preserved at trial for review, and he knew or should have known that the court could not act on those issues. Also Harrison had testified that he was not aware of the risk of petitioner's receiving a greater sentence. In his objections petitioner called attention to Watson v. State, 392 So. 2d 1274 (Ala. Crim. App. 1980), which had held that provisions of the Habitual Offender Act

are mandatory and not discretionary and that the use of the word "must" in the Act left no discretion with the trial court whether a repeat offender would be punished under the statute.

The district judge overruled Peoples' objections and adopted the recommendations of the magistrate. The present appeal ensued.

On appeal the state does not question the conclusion of the magistrate, adopted by the district court, that there was no abuse of the writ, therefore we do not address it. This brings us, finally, to the merits.

[1, 2] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), set forth a two-part test for determining whether the Constitution entitles defendant to relief. First, "the defendant must show that counsel's

representation fell below an objective standard of reasonableness." Id. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d 693. In assessing counsel's conduct against this standard a reviewing court must examine "the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d 695. Second, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

[3] We hold that under this standard appellate counsel was ineffective. Watson had come down October 28, 1980, seven and on-half months before petitioner was first sentenced (June 1981) and 17 months before Harrison filed his appellate brief

(in April 1982). The language of Watson is decisional:

> The word "must," as it is used in [the HFOA], leaves no discretion with the court as to whether a repeat offender is to be punished under the statute.... [T]he increased punishment appellant received on his trial conviction became mandatory because of appellant's status as a prior offender."

392 So. 2d at 1276, 77.[5] This language leaves no doubt as to the mandatory nature of the HFOA.

The state, seeking to avoid the holding in Watson, says that the language of the court of criminal appeals, quoted above, is only addressed to the court,

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[5]The statutory mandate, as applied to Watson, involved §9(c)(1) because he had more than three priors and was convicted of a Class C felony, thus the court could assess life or 15 to 99 years.

Petitioner falls under 9(b)(3) because he had two priors and was convicted of a Class A felony, which required a sentence of life or not less than 99 years.

i.e, "the word 'must' [as used in the statute] leaves no discretion with the court....", 392 So. 2d at 1276, and thus the prosecutor either had or thought he had discretion to invoke the act, and Harrison was entitled to draw the same conclusion and therefore was not ineffective in exposing his client to the risks of further litigation. But the opening sentence of the court's holding in Watson says: "The provisions of the Habitual Offender Statute are mandatory and not discretionary...." And the conclusion of the discussion, at p. 1277, reiterates the mandatory nature of the statute.

Moreover, in another case decided before petitioner was sentenced, the court of criminal appeals reiterated the mandatory nature of the HFOA. Holley v. State, 397 So. 2d 211, 215 (Ala. Crim.

Appeal 1981). In other cases decided after petitioner was sentenced but before Harrison filed his brief in the court of criminal appeals the message of Watson was restated. Aplin v. State, 421 So. 2d 1299 (Ala. Crim. Appeals 1981).[6]

The state also argues that it was uncertain whether a drug offense, such as Peoples had, could be counted as one of the two priors. This had been answered in Motley v. State, 409 So. 2d 945 (Ala. Crim. Appeals 1981), decided four and one-half months before Harrison filed his brief. Smith v. State, 409 So. 2d 455 (Ala. Crim. App. 1981), decided more than four months before Harrison filed his brief, held that a defendant's own

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[6]The state urges that the absence of an election by the prosecutor to trigger the HFOA was not settled until Aplin. Even if this was so it would not aid the state, since Aplin was decided four and one-half months before Harrison filed his brief.

testimony could be used to prove prior felonies under the HFOA. Thus, the state's contention that Harrison could not have known that Peoples' own testimony provided the requisite proof of prior felonies lacks merit.

In summary, well before Harrison filed his brief in the court of criminal appeals it was settled law that the HFOA was mandatory, that Peoples' drug conviction counted as a prior, and that Peoples' own testimony admitting the priors was sufficient proof of their existence. Thus Peoples' case was not a case of first impression with respect to the mandatory nature of the HFOA or with respect to his eligibility for it or the nature of proof at trial.

Appellate counsel did not know that of its own motion the court of appeals would take note of the failure of the

trial court to follow the HFOA and vacate the sentence and remand the case for the statute to be applied. But the concern is not that counsel did not advise Peoples in sure and certain terms what the court of appeals would do, for he could not know that. But counsel was bound to consider himself, and to advise his client, of the risks that the appeal presented. Repeatedly the court of criminal appeals had said previously that application of the HFOA was required. At least there was substantial risk that the court would treat the statute as mandatory, as it had characterized it, and implement the mandatory application of it. There was little on the other side of the scales -- two issues not even preserved for appllate review. Peoples was entitled to decide whether to take his chances on appeal with as good

knowledge as was reasonably available of what the stakes were -- that if he proceeded with the hopeless merits appeal he might, just might, end up with 99 years or life instead of 20. He never knew the risks. And he ended up with life. Under these facts, Harrison's representation of Peoples falls below the objective standard of reasonableness that the constitution mandates.

Peoples was established sufficient prejudice from his counsel's unreasonable actions to entitle him to relief. Both Peoples and Harrison agree that had they been aware of what the stakes were there would have been no appeal. Thus counsel's actions led Peoples to take an appeal that subjected him to risk that his sentence would be increased from 20 years to life, and that risk came to fruition. This satisfies the prejudice test of Washington.

The state suggests that prejudice has not been shown because even if Harrison had been aware of the risks to his client the matter was beyond salvation because notice of appeal had been filed before he was appointed and the court of appeals might not have permitted him to dismiss the appeal. This is pure speculation and is simply out of keeping with the way appellate courts in general proceed. The transcript was not filed until March 1982, and until that time it was unlikely that the court of criminal appeals would have been aware of the discrepancy of sentence. Peoples is entitled to a writ of habeas corpus.

REVERSED and the case REMANDED to the district court for the issuance of a writ vacating Peoples' life sentence.